86 1665

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LASCO LAVAUN HURT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. IS A SEARCH WARRANT FOR A PRIVATE RESIDENCE WHICH AUTHORIZES THE SEIZURE OF MATERIAL DEPICTING MINORS (I.E., PERSONS UNDER THE AGE OF 16) ENGAGED IN SEXUALLY EXPLICIT ACTIVITY SUFFICIENTLY PARTICULAR?

II. MAY A SEARCH WARRANT FOR A PRIVATE RESIDENCE BE ISSUED AND EXECUTED FOR EVIDENCE OF RECEIVING NONMAILABLE (OBSCENE) MATERIAL WHEN SUCH EVIDENCE CONSISTS OF MATERIALS THE POSSESSION OF WHICH IN A PRIVATE RESIDENCE IS PROTECTED UNDER STANLEY V. GEORGIA, 394 U.S. 557 (1969)?

PARTIES

The interested parties are:

United States of America

Lasco Lavaun Hurt

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Lasco Lavaun Hurt, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 25, 1986, (795 F.2d 765), as amended by Order filed January 20, 1987.

OPINION BELOW

The Ninth Circuit Court of Appeals affirmed in part and reversed in part the defendant's conviction on July 25, 1986. (795 F.2d 765) (Appx. 1). On January 20, 1987, the petitioner's request for rehearing and suggestion for rehearing en banc were denied. (Appx. 2).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This Petition arises out of the defendant's conviction in the United

States District Court for the District of Oregon on a two count-indictment charging aiding and abetting in the use of the mails for the mailing of nonmailable (i.e., obscene) matter, by violation of 18 U.S.C. §§ 1461 and 2. Judgment was entered in the District Court on April 16, 1985. Notice of appeal was timely filed. On July 25, 1986, the United States Court of Appeals for the Ninth Circuit affirmed the defendant's conviction on Count 1 only. The defendant filed a timely Petition for Rehearing.

On January 20, 1987 the Court of Appeals entered an order denying the Petition for Rehearing but amending its original opinion.

The jurisdiction of this Court arises out of 28 U.S.C. § 1254(1).

The defendant was released on bail pending appeal.

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment I (Appx. 5)

United States Constitution Amendment IV (Appx. 6)

United States Constitution Amendment IX (Appx. 7)

United States Constitution Amendment XIV (Appx. 8)

Article I § 8 of the Oregon Constitution (Appx. 9)

STATUTORY PROVISIONS

Title 18, United States Code, Sec. 2 (Appx. 10)

Title 18, United States Code, Sec. 1461 (Appx. 11)

STATEMENT OF THE CASE

On July 17, 1984, defendant Lasco Lavaun Hurt was charged by indictment

with two counts of mailing obscene matter, in violation of 18 U.S.C. §§ 1461 and 2. (Appx. 11). He entered pleas of not guilty to each count on August 2, 1984. Pretrial motions raising, inter alia, the issues presented in the Petition for Certiorari were timely filed and heard by the District Court on October 2, 1984 and October 18, 1984. On October 18, 1984, defendant waived a jury trial and stipulated that the evidence adduced at these hearings would be the same as that offered at trial.

Following denial of the pretrial motions, a bench trial was held before the trial judge, who took the matter under advisement. On January 24, 1985, the court found the defendant guilty of both counts of the indictment. (Appx. 3).

On April 14, 1985, the defendant was sentenced to a term of imprisonment for five years and a fine of $5,000.00 on both Counts. The court suspended execution of the sentence of incarceration on Count 2, placed the defendant on probation for a period of five years commencing upon his release from physical custody on Count 1. The court permitted the defendant to remain on release pending appeal.

STATEMENT OF FACTS

On December 7, 1983, two packages mailed from Amsterdam, Holland arrived at the international mail facility at Oakland, California. Each package was addressed to the defendant at his home in Myrtle Point, Oregon. One package was labeled as containing a tablecloth, the other a name plate. While being processed through the customs area of the

mail facility, a mail technician examined the parcels and found that they contained unreeled films. The first package contained two 8 mm films entitled "Young Girl" and "First Suck". The second package contained one film entitled "Dick, Billy & Mike".

The packages were forwarded to U.S. Customs in Portland, Oregon, where they were inspected by U.S. Postal Inspector Robert Luttrell. He viewed the films and concluded that they portrayed "minors" (i.e., persons under the age of 16) engaging in sexually explicit conduct.

Based on this viewing an affidavit was submitted to the magistrate who issued a warrant for the defendant's residence as follows:

> Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the person of) (on the premises known as) 722 Willow Street, Myrtle Point, Oregon in the District

of Oregon there is now being concealed certain property, namely

(1) Three films titled
   a) "First Suck";
   b) "Dick, Billy and Mike"; and
   c) "Little Girl";

(2) Books, magazines, photographs, negatives, films and video tapes depicting minors (that is, persons under the age of 16) engaged in sexually explicit conduct; and

(3) Correspondence and records of any kind reflecting the ordering, receipt,

61 shipping, and payment for child pornography;

which are the fruits, instrumentalities, and evidence of the offenses of the interstate transportation and mailing of child pornography, and the unlawful importation of child pornography, and in violation of 18 U.S.C. §§ 2252 and 545, and 19 U.S.C. § 1305, and 18 U.S.C. §§ 1461 and 1462.[1]

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[1] The "child pornography" statute cited (i.e. 18 U.S.C. § 2252, as amended by the "Child Protection Act of 1984") was not in effect at the time of this incident. The Government therefor could not and has not relied on this statute as

continued on next page

On December 21, 1983, Mr. Luttrell gave a mail carrier the two packages to deliver to the defendant at his home. Mr. Luttrell and several other law enforcement agents waited nearby while the mail carrier delivered the packages.

Approximately 30 minutes later, the agents executed the search warrant and entered the defendant's home. Mr. Hurt was present. Agents took him into the living room area and advised him of his rights. In response to one agent's statement, Mr. Hurt pointed to the coffee table and informed the agents that what tney were looking for was there. The coffee table contained a film reel and three unreeled films which the agents

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providing grounds for the search of the defendant's home or the search or prosecution of defendant. Hence, neither its validity nor its implications regarding possession of materials proscribed by it are involved in this Petition.

determined to be the ones which had just been delivered.

As a result of further questioning, Mr. Hurt took the agents to his bedroom where the following items (listed as inventoried in the search warrant return) were seized:

1. 8 mm. Film -- Anal Dildo SF-128
2. Book Nude Beaches & Recreation
3. 8 mm. Film -- Sera Serena Sisters
4. 8 mm. Film -- Super 8 Rear View
5. 8 mm. Film -- Plato's
6. 8 mm. Film -- Sweet Rider
7. 8 mm. Film -- Safari
8. 8 mm. Film -- R-8 Xmas 2G LB
9. 8 mm. Film -- Red-Dress-Shower
10. 8 mm. Film -- 32 to 42 Stretch
11. 8 mm. Film -- Brooke Tite End
12. 8 mm. Film -- Rear view
13. 8 mm. Film -- Bakers Dozen
14. Container, Film (8 reel fillers)
15. Book -- Show Me (additional photo inserts
16. Photo Album (Children/Adult)
17. Book -- 32 page -- Lida Patty (Denmark)
18. Book -- 32 page -- Sweet Linda (Denmark)
19. 8 mm. Film w/container unnamed
20. Index Box -- 3x5 cards w/names & addresses

21. Three (3) 8 mm. Films (original seizure) w/wrappings
22. Box of 4 toy pistols (w/caps)
23. Envelope w/straps & rubber items
24. Movie Projector "GAF" 2788-Z Serial # 31847
25. Mis. Order blanks & brochures
26. S Fran Customs Seizure Notice # 84-2801-02116
27. US Postal Money Order Receipt & Registry Receipt
28. Ten Rubber Abnormal Sexual Device items.

None of the films was viewed by any agent before being seized. Inventory items 2, 15, 16, 17, 18, 19 and 25 were, inter alia, introduced into evidence as government exhibits 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16. The District Court specifically referenced exhibits 7 (Inventory item 15), 8 (Inventory item 16), 9 (Inventory item 17) and 10 (Inventory item 18) in its written opinion finding guilt. (Appx. 3).

LEGAL ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Certiorari should be granted in this case to resolve the conflict between the First and Ninth Circuits regarding the validity of the search warrants purporting to authorize the seizure of materials alleged to depict "minors" (i.e. persons under the age of 16) engaged in sexually explicit activity. Compare United States v. Diamond, _____ F.2d _____ (First Circuit Case No. 86-1380, Slip Opinion dated January 14, 1987), with United States v. Hurt, 795 F.2d 756 (Ninth Circuit Case No. 85-3058, Slip Opinion dated July 25, 1986, amended by order filed January 20, 1987).

Certiorari is also appropriate to determine whether a warrant may be secured and executed on a private residence to search for and seize

materials the possession of which is protected by Stanley v. Georgia, 394 U.S. 557 (1969).

I.

IS A SEARCH WARRANT FOR A PRIVATE RESIDENCE WHICH AUTHORIZES THE SEIZURE OF MATERIAL DEPICTING MINORS (I.E., PERSONS UNDER THE AGE OF 16) ENGAGED IN SEXUALLY EXPLICIT ACTIVITY SUFFICIENTLY PARTICULAR?

In this case, the Ninth Circuit held that a search warrant authorizing seizure of material portraying "minors (that is, persons under the age of 16) engaged in sexually explicit activity" is sufficiently particular to satisfy the Fourth Amendment. The Court further stated that "[a]ny rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16 when he sees it." (Appx. 1).

In contrast, in United States v. Diamond _____ F.2d _____, (decided January 14, 1987), the First Circuit held

invalid a search warrant which authorized the seizure of videotapes or other visual depictions of prepubescent children or "children under the age of 18 years" involved in sexually explicit conduct. The Court found that such a warrant essentially vested the searching officers with unbridled discretion in making the determination of whether a person was under the age of 18.

The positions of the First and Ninth Circuits are irreconcilable. Because the experiential and analytical grounds of the First Circuit's decision are by far the more compelling, this Court should resolve this conflict in favor of the analysis of the Diamond court. This conflict should be resolved.

Underlying the analysis of the Diamond opinion is this Court's repeated declaration that films or books are

accorded special status under the First Amendment. Diamond cited to New York v. P.J. Video, Inc., 475 U.S. _____, 89 L.Ed.2d 871, 106 S.Ct. _____ (1986) in support of this principle as a starting point for its analysis. The First Circuit then went on to note that an authorization for the seizure of films depicting "children under the age of 18 years" gave the searching officers nothing by which to identify seizable films nor any guidance regarding how to determine whether a person depicted was 17 rather than 19.

Since Marron v. United States, 275 U.S. 192, 196 (1927), this Court has consistently maintained that the Fourth Amendment requires that "warrants shall particularly describe the thing to be seized [and] makes general searches under them impossible." This requirement of

particularity is intended to prevent "a general, exploratory rummaging in a person's belongings." Andersen v. Maryland, 427 U.S. 463, 480 (1976). "As to what is to be taken, nothing is [to be] left to the discretion of the officer executing the warrant." Marron v. United States, supra, 275 U.S. at 196.

The constitutional requirement of particularity must be evaluated with the "most scrupulous exactitude" when the things to be seized are books and the basis for seizure is the ideas they contain." Stanford v. Texas, 379 U.S. 476, 485 (1965).

Although this Court in Roaden v. Kentucky, 413 U.S. 396, 501-02 (1973), addressed the question of a warrantless seizure of a film, the opinion speaks equally well to the instant situation:

> The Fourth Amendment proscription against "unreasonable . . . seizures" . . . must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. Coolidge v. New Hampshire, 403 U.S. 443, 471-472, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); id., at 509-510, 29 L.Ed.2d 564 (Black, J., concurring and dissenting); id., at 512-513, 29 L.Ed.2d 564 (White, J., concurring and dissenting).
>
> * * *
>
> The seizure of instruments of a crime, such as a pistol or a knife, or "contraband or stolen goods or objects dangerous in themselves," id., at 472, 29 L.Ed.2d 564, are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

The execution of a search warrant, failing in particularity, is really no different from "the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials

considered by the complainant to be obscene." Marcus v. Search Warrant, 367 U.S. 717, 732 (1961). For this reason:

> ". . . [i]t is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling, paraphernalia and other contraband." A Quantity of Books v. Kansas, 378 U.S. 205, 211-12 (1964).

The description set forth in the search warrant in Mr. Hurt's case of the items to be seized simply failed to meet the particularity requirement of the Fourth Amendment. For this reason, the Court should grant this Petition for Writ of Certiorari and declare the seizures made pursuant to the warrant invalid, as did the First Circuit in United States v. Diamond, supra.

II.

MAY A SEARCH WARRANT FOR A PRIVATE RESIDENCE BE ISSUED AND EXECUTED FOR EVIDENCE OF RECEIVING NONMAILABLE (OBSCENE) MATERIAL WHEN SUCH EVIDENCE CONSISTS OF MATERIALS THE POSSESSION OF WHICH IN A PRIVATE RESIDENCE IS PROTECTED UNDER STANLEY V. GEORGIA, 394 U.S. 557 (1969)?

As described in the Statement of Facts, supra, postal inspectors obtained a warrant for the defendant's home which authorized the seizure of (1) three specified films and (2) unspecified "books, magazines, photographs, negatives, films and video tapes depicting minors (that is, persons under the age of 16) engaged in sexually explicit conduct." Based on this warrant, the inspectors searched the defendant's residence and seized numerous such items. The unspecified films were seized without prior viewing.

In Stanley v. Georgia, 394 U.S. 557 (1969), this Court held that the

fundamental constitutional right "to be let alone" [citing Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J. dissenting)] precluded the Government from basing a criminal charge on the possession of obscene material in one's home. Previously, in Roth v. United States, 354 U.S. 476 (1957), this Court had held that obscenity was outside the protection of the First Amendment. As a result, the prosecution argued in Stanley that the State could regulate or prohibit obscene materials as contraband. This Court rejected this argument, noting:

> "Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity, but the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decisions of this Court reaches that far." Stanley, supra, 394 U.S. at 563.

The Court then proceeded to examine the constitutional implications and governmental interests involved in statutes prohibiting the mere possession of the obscene material. Though acknowledging that the Government may validly regulate and even prohibit commercial distribution of obscene matter, the court concluded that the proscribing possession "incident to statutory schemes prohibiting distribution" [Id. at 567] could not "justify infringement of the individual's right to read or observe what he phases." Id. at 568.

> "Whatever may be the justifications for other statutes regulating obscenity, 'we do not think they reach the privacy of one's own home.' If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving

> government the power to control men's minds." Id. at 565.

Thus, with Stanley the court established that as a fundamental privacy right a citizen may possess obscene material in his own home without fear of "federal [or] state intrusion." Id. at 563; (emphasis added).

The Stanley decision was a natural extension of this Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965). Griswold specifically resuscitated the Ninth Amendment jurisprudence. Id. at 484. Griswold was promptly followed by Osborn v. United States, 385 U.S. 323 (1966) in which Justice Douglas reiterated this Amendment's significance:

> The Ninth Amendment should be permitted to occupy its rightful place in the Constitution as a reminder at the end of the Bill of Rights that there exist rights other than those set out in the first eight amendments. It was

> intended to preserve the underlying theory of the Constitutional Convention that individual rights exist independently of government, and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The Ninth is simply a rule of construction, applicable to the entire constitution. Id. at 352 n. 15 (Douglas, J., dissenting), referring to Comment, 33 U. Chi. L. Rev. 814, 835 (1966).

While the Stanley decision explicitly dealt with a person's right to possess obscene material, it additionally suggested that the right to possess information implied the right to receive information.

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . .." Martin v. City of Struthers, 319 U.S. 141, 143, 87 L.Ed 1313, 1316, 63 S.Ct. 862 (1943); . . .. This right to receive information and ideas, regardless of their worth, ...

> is fundamental to our free society. . . . Id. at 564.

This same recognition recently lead the Oregon Supreme Court to conclude that because Article I, § 8, of the Oregon Constitution precludes finding certain forms of expression outside its protections, statutes prohibiting the "dissemination of obscene material" are unconstitutional and unenforceable. See State v. Henry, 302 Or. 510, _____ P.2d _____ (1987). The Oregon Supreme Court thus has established that the right to "read would indeed be meaningless if it did not include the right to "deliver or provide" the materials read.

It is certainly true that since Stanley, this Court has moved away from this view. The Court has explicitly rejected the argument that the right to possess information carries with it the unrestricted right to receive

information. See, e.g., Smith v. United States, 431 U.S. 291, 306-307 (1976); United States v. 12,200 Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 128 (1973); United States v. Reidel, 402 U.S. 351, 355 (1971). But these cases deal only with the validity of statutes which substantively prohibit the importation or transportation of obscenity. They do not address the question of whether or not the Government may intrude into a person's home to seize evidence of violations of such valid laws. Indeed, this Court has never waivered from its holding in Stanley that once possessed in the privacy in one's own home, even obscene materials achieve insulation from official intrusion. Privacy rights, after all, protect persons, not things. Stanley specifically guaranteed that a person could possess obscene material in

the privacy of his own home "without fear of federal . . . intrusion." Id. at 563. The execution of a search warrant is precisely such an intrusion and hence is invalid. Indeed, the essence of the Stanley opinion is that a search warrant for items the possession of which is protected is impermissible.

The search warrant in Mr. Hurt's case specifically authorized entry into his home to seize items he was constitutionally entitled to possess there. The warrant itself -- as well as the searches and seizures conducted under its authority -- infringed upon both his state and federal constitutional rights of privacy. Indeed, given the Oregon Supreme Court's view in State v. Henry, supra, that "in this state any person can write, print, read, say, show or sell anything to a consenting adult even

though that expression may be generally or unanimously considered 'obscene'." Id. at 525, the intrusion into Mr. Hurt's home for each of these reasons the warrant and searches underlying Mr. Hurt's prosecution should be invalid.

C.

CONCLUSION

For each of the reasons stated above, this Court should grant this Petition for Writ of Certiorari, review the decision of the Court of Appeals for the Ninth Circuit and declare search warrants issued and executed in this case invalid.

DATED this 23rd day of March, 1987.

Respectfully submitted,

RANSOM, BLACKMAN & SIMSON

JOHN S. RANSOM
Counsel for Petitioner-Appellant

APPENDIX

*FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 85-3058
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR 84-95-01
vs.	)	BU
	)	
LASCO LAVAUN HURT,	)	OPINION
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court of the District of Oregon
James M. Burns, District Judge, Presiding

Argued and submitted March 4, 1986
Portland, Oregon

Before: FLETCHER, ALARCON, and WIGGINS, Circuit Judges.

ALARCON, Circuit Judge:

Lasco Lavaun Hurt (hereinafter Hurt) appeals from a conviction of two counts of violation of 18 U.S.C. § 2 and § 1461 for use of the mails for the delivery of two packages containing nonmailable obscene materials.

I. CONTENTIONS ON APPEAL

Hurt seeks reversal on the following grounds.

One. Section 1461 does not apply to persons who use the mail to order and receive obscene materials.

Two. Section 1461 of Title 18 is unconstitutional as applied to him.

Three. The district court erred in denying his motion to suppress the physical evidence seized in his home pursuant to a search warrant that failed to describe with particularity the items to be seized.

Four. The district court erred in admitting into evidence other allegedly obscene material to prove the defendant's knowledge of the nature of the films he ordered and received through the mails.

Five. The evidence was insufficient to prove that he knew the nature and

contents of the films he ordered and received in the mail.

Six. The district court erred in imposing consecutive sentences because the evidence showed that he committed only the offense of using the mails to send a single order for three obscene films that were received simultaneously in two separate packages.

We reject each of Hurt's contentions concerning the judgment entered regarding Count One. We reverse Count Two as a violation of the rule against multiple sentences for a single offense.

II. PERTINENT FACTS

The evidence in this case consisted of the testimony of a customs officer and a postal inspector and materials seized at Hurt's home. No defense evidence was offered.

On or about September 1, 1983, Hurt

mailed an order form to Alex Smit, Post Office Box 705, Stockholm, Sweden in which he requested that three films be sent to him. The films were paid for by a money order in the amount of $476.06 made payable to Alex Smit. The instructions for the ordering of Smit films requested that the title not be set forth on the order form. Instead, the consumer was directed to place an "X" in the appropriate box.

In response to this order, Smit mailed three films to Hurt in two separate packages. The customs declarations on one package stated it contained a name plate. In fact, it contained one film entitled "First Suck," and another entitled "Young Girl." The second package bore a customs declaration identifying the contents as a tablecloth. Instead, it contained a film entitled

"Dick, Billy, and Mike." The films in the packages were not on reels. These packages were inspected on December 7, 1983, at the international mail facility in Oakland, California, by United States Customs mail technicians. Each film depicted children engaged in sexually explicit conduct.

The packages were forwarded by government officials to the United States Customs Service in Portland, Oregon. There, the packages were again inspected by United States Postal Inspector Robert Luttrell. A search warrant was obtained to search Hurt's residence based upon the obscene content of the three films. The warrant authorized the seizure of the films after their delivery to Hurt. The warrant also permitted the seizure of any other materials depicting minors engaged in sexually explicit conduct and

"[c]orrespondence, and records of any kind reflecting the ordering, receipt, shipping, and payment for child pornography."

On December 21, 1983, Postal Inspector Luttrell gave the packages to a mail carrier who delivered them to Hurt's residence. Thirty minutes later, Postal Inspector Luttrell and eight or nine law enforcement officers entered the Hurt residence pursuant to the search warrant. As soon as the officers entered, Special Agent Daniel Nafziger advised Hurt of his right to remain silent and his right to counsel. The parties stipulated that this admonition complied with Miranda v. Arizona, 384 U.S. 436 (1966). Hurt advised the officers that he understood his rights. Special Agent Nafziger asked Hurt if he recognized the officer from a previous interview concerning the subject

of pornography. Hurt told the officer that the materials they were probably looking for were on the coffee table. The sexually explicit films delivered by the mail carrier were on the coffee table. The film was unreeled.

Special Agent Nafziger then asked Hurt where he kept his pornography. The parties stipulated that Hurt took the officers to his bedroom and opened a closet which contained approximately eighteen films, albums, and books depicting or describing minors engaged in sexually explicit conduct. The officers also found a gray file box which contained a money order receipt. Hurt told the officers that he had used the money order to obtain the films delivered that day. The officers found the mail wrappers for the two packages of Smit films in a trash burner in the kitchen.

A search of the premises revealed a photo album containing pictures of children engaged in sex acts with other children and adults. The officers also found two publications that contained photographs of minors engaged in sex acts with adults. The officers also discovered a film in a closet in the bedroom depicting a minor engaging in sex acts with a dog and an adult male. The search also revealed several brochures advertising publications which depict children engaging in sexually explicit conduct. One was entitled "Teenager."

The officers also located an Alex Smit ordering brochure that contained a list of blocks with numbers. The officers did not discover any brochure that contained the names of the films that corresponded to the numbers on the order form.

On July 17, 1984, Hurt was charged in two counts with "knowingly us[ing] the United States Mails for the mailing, carriage in the mails and delivery of nonmailable matter" depicting children engaged in obscene conduct in violation of 18 U.S.C. § 1461 (1984) and 18 U.S.C. § 2 (1984). Hurt waived trial by jury. He was convicted as charged. The district judge found as a fact that the "defendant knew full well the pornographic character of that which he ordered from Amsterdam." He also found, after viewing the films in question, that they met the standards for obscenity as set forth in Miller v. California, 413 U.S. 15 (1972). He was given consecutive sentences.

III. DISCUSSION

A. APPLICABILITY OF SECTION 1461 TO A PERSON WHO USES THE MAILS TO ORDER OBSCENE MATERIALS

Hurt claims that the district court erred in denying his motion to dismiss the indictment. He argues that section 1461 does not apply to the recipient of obscene materials.[1]

The denial of a motion to dismiss an indictment is reviewed for abuse of discretion. United States v. Moore, 653 F.2d 384, 389 (9th Cir.), cert. denied, 454 U.S. 1102 (1981). A trial court does not have the discretion to misapply the law. If the district court's ruling is based on its construction of a statute, we are required to make an independent or de novo interpretation of the applicable law. United States v. Louisiana Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985); see also United States v.

McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 105 S.Ct. 101 (1984).

Hurt was indicted under that portion of section 1461 that provides in pertinent part as follows:

> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned no more than ten years, or both, for each such offense thereafter.

The language "whoever knowingly uses the mails" in section 1461 does not limit prosecution to a person who uses the mails to send obscene materials to another. The language of the statute is broad enough to include persons who use the mails to order the delivery of obscene materials. Hurt does not argue

that a person who uses the mails to order the delivery of sexually explicit material is not included within the plain meaning of the words "whoever knowingly uses the mails." Instead, he contends that Congress enacted section 1461 solely "to penalize the sender of such material." He relies on the opinion of the district court in United States v. Sidelko, 248 F.Supp. 813 (M.D. Pa. 1965) to support his argument that we must disregard the expansive sweep of the language used by Congress. We decline to adopt the holding in Sidelko because the district court in the matter failed to apply the appropriate rules of legislative construction.

In Sidelko, as here, the defendant was accused of using the mails to order obscene materials. The district court granted the defendant's motion for a

judgment of acquittal on the ground that section 1461 does not apply to the recipient of obscene matter through the mails. The district court in Sidelko noted that prior to 1965, punishment under section 1461 was limited to a person who "knowingly deposits for mailing or delivery" nonmailable material. In 1965, however, the statute was amended by substituting the words "[w]hoever knowingly uses the mails" for the words "[w]hoever knowingly deposits." The district court in Sidelko looked to the legislative history to discern the basis for this amendment. The court noted that the legislative history reflected concern by Congress that in United States v. Ross, 205 F.2d 619 (10th Cir. 1953), the Tenth Circuit had held that, under section 1461, an accused could be prosecuted only at the place of

deposit of the obscene matter in the mails. The Sidelko court concluded that the amendment "was designed to overcome the effect of the Ross decision." 248 F.Supp. at 814. The district court in Sidelko noted that prior to 1985, punishment under section 1461 was limited to a person who "knowingly deposits for mailing or delivery" nonmailable material. In 1985, however, the statute was amended by substituting the words "[w]hoever knowingly uses the mails" for the words "[w]hoever knowingly deposits." The district court in Sidelko looked to the legislative history to discern the basis for this amendment. The court noted that the legislative history reflected concern by Congress that in United States v. Ross, 205 F.2d 619 (10th Cir. 1953), the Tenth Circuit had held that, under section 1461, an accused

could be prosecuted only at the place of deposit of the obscene matter in the mails. The Sidelko court concluded that the amendment "was designed to overcome the effect of the Ross decision." 248 F.Supp. at 814. The district court in Sidelko determined that the words used in the amendment to section 1461 were "not intended to apply to persons who order and receive such matter for personal use and consumption." Id. at 815. The Ross decision was the only authority cited by the court in support of its decision. No reference was made to any of the canons of the legislative construction.

The method used by the court in Sidelko to interpret the language used by Congress is contrary to traditional rules of legislative construction and more recent decisions of the United States

Supreme Court and the law of this circuit.

In construing a statute, we must first look to the plain language used by Congress. North Dakota v. United States, 460 U.S. 300, 312 (1983); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983); Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349, 1353 (9th Cir. 1985). If the language of the statute is unambiguous, it is conclusive unless there is a "clearly expressed legislative intention to the contrary . . . ." North Dakota, 460 U.S. at 312 (quoting Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); Dickerson, 460 U.S. at 110. Although we are aware of the rule of strict construction for criminal statutes, that rule does not allow us to ignore a statute's evident

purpose. United States v. Hogue, 752 F.2d 1503, 1504 (9th Cir. 1985).

It is evident to us that the words"whoever knowingly uses the mails" include a person who uses the mails to order the delivery of obscene materials. Accordingly, we are precluded from reliance on legislative history to give the language of the statute a different construction unless we are directed to specific provisions of the legislative history that clearly express a contrary intent.

We have reviewed the legislative history. We cannot find, nor has Hurt identified, any clear expression by Congress that it intended to limit the words "whoever uses the mails" to persons who use the mails to send sexually explicit materials to consumers thereof. The fact that Congress amended the

statute to insure that the sender of obscene materials could be prosecuted in any jurisdiction where such matter is delivered, does not evidence a clear intent to exclude from prosecution persons who use the mail to order nonmailable matter.

Therefore, after construing the plain meaning of the words employed by Congress, we conclude that section 1461 applies to a person who uses the mails to order the delivery of obscene materials.

B. CONSTITUTIONALITY OF SECTION 1461 AS APPLIED TO A PERSON WHO USES THE MAILS FOR THE DELIVERY OF OBSCENE MATERIALS FOR PERSONAL USE.

Prior to trial, Hurt also sought dismissal of the indictment on the ground that a person who uses the mails to order obscene materials is immune from prosecution under section 1461 because he has a constitutional right to possess

such matter for his personal use. The district court denied his motion. We are also unpersuaded by this contention.

We review de novo the denial of a motion to dismiss an indictment on constitutional grounds. United States v. Christopher, 700 F.2d 1253, 1258 (9th Cir.), cert. denied, 461 U.S. 960 (1983).

Hurt correctly observes that in Stanley v. Georgia, 394 U.S. 557 (1969), the Supreme Court held that a person may not be charged with the possession of obscene materials in his own home. Id. at 568. Hurt was not charged with or convicted of the possession of obscene materials. Section 1461 proscribes the use of the mails for the mailing, carriage, or delivery of sexually explicit materials, not the possession thereof.

Hurt asserts that the constitutional right to possess obscenity for personal use includes the right to receive obscene material for such purpose. This argument was rejected by the Supreme Court in United States v. Orito, 413 U.S. 139, (1973). In Orito, the Supreme Court reiterated its rejection of the notion that "the right to possess obscene material in the privacy of the home . . . creates a correlative right to receive it . . . ." Id. at 141. Earlier, in United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), the Supreme Court noted that "Congress may constitutionally prevent the mails from being used for distributing pornography." Id. at 376 (citing United States v. Reidel, 402 U.S. 351 (1971)). In Reidel, the Supreme Court held that the prosecution of a distributor for the knowing use of the

mails for the delivery of obscene matter in violation of section 1461 did not conflict with the right to possess obscenity in the privacy of the home. Id. at 354.

In United States v. 12 200-ft. Reels of Super 8 MM. Film, 413 U.S. 123 (1973), the Supreme court stated that it was "not disposed to extend the precise, carefully limited holding of Stanley to permit importation of admittedly obscene material simply because it is imported for private use only." Id. at 128. More recently, in Smith v. United States, 431 U.S. 291 (1977), the Court, in construing section 1461 instructed that "Stanley did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home." Id. at 307 (emphasis added).

Hurt argues that Griswold v. Connecticut, 381 U.S. 479 (1965) decided four years before Stanley compels us to hold that the right to receive obscene material is "constitutionally protected once it is in his home." Appellant's Opening Brief, page 19. Hurt also asks us to reject the Supreme Court's limitation of Stanley in its decision in 12 200-ft Reels of Super 8 MM. Film, to the right to possess obscene materials in the privacy of the home as "fundamentally unconsistent [sic] with the foundational precepts of this country." Appellant's Opening Brief, page 18. These arguments must be addressed to the Supreme Court.

The federal Constitution does not protect the right to receive obscenity through the mails for personal use. The district court did not err in denying Hurt's motion to dismiss the indictment

under Stanley v. Georgia, and its progeny.

C. ADEQUACY OF THE SEARCH WARRANT'S DESCRIPTION OF THE ITEMS TO BE SEIZED

Hurt asserts that the district court erred in denying his motion to suppress the items seized pursuant to the search warrant on the ground that it failed to describe the items to be seized with particularity.

We review de novo a challenge to the validity of a search warrant for the failure to particularity describe the items to be seized. United Stats v. McClintock, 748 F.2d 1278, 1282 (9th Cir. 1984), cert. denied, 106 S.Ct. 75 (1985).

Under the fourth amendment, a search warrant must "particularly describ[e] the place to be searched, and the person or things to be seized." U.S. const. amend.

IV. The Constitution prohibits the issuance of general warrants that would lead to "exploratory rummaging in a person's belongings . . . ." Andresen v. Maryland, 427 U.S. 463, 480 (1976) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)). The purpose of particularizing the items to be seized is to insure that when the warrant is executed, nothing is left to the officer's discretion. United States v. Drebin, 557 F.2d 1316, 1322 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); Marron v. United States, 275 U.S. 192, 196 (1927).

Hurt argues that the warrant failed to make any distinction between material which would be evidence in a prosecution under statutory provisions and that which would not. Appellant's Opening Brief, page 22. This argument is readily

refuted by consulting the language of the warrant. The magistrate restricted the scope of the officer's search to the following items:

> (1) Three films titled a) "First Suck"; b) "Dick, Billy and Mike"; and c) "Little Girl";
>
> (2) Books, magazines, photographs, negatives, films and video tapes depicting minors (that is, persons under the age of 16) engaged in sexually explicit conduct; and
>
> (3) Correspondence and records of any kind reflecting the ordering, receipt, shipping, and payment for child pornography;
>
> which are the fruits, instrumentalities, and evidence of the offense of the interstate transportation and mailing of child pornography, and the unlawful importation of child pornography, in violation of 18 U.S.C. §§ 2252 and 545, and 19 U.S.C. § 1305, and 18 U.S.C. §§ 1461 and 1462.

The affidavit filed in support of the search warrant described the three

films as depicting sexually explicit conduct. The remaining items to be seized were restricted to (1) materials depicting children under the age of 16 engaged in sexually explicit conduct and (2) written documents that could serve as evidence of the use of the mails to order child pornography. The obscene films described in the warrant formed the basis for the prosecution in this matter. The remaining items described in the warrant consisted of evidence that would prove an element of the crime proscribed in section 1461. Moreover, the warrant sufficiently described evidence that would prove an element of the crime proscribed by section 1461. United States v. Rubio, 727 F.2d 786, 792 (9th Cir. 1983); United State v. Barnett, 667 F.2d 835, 843 (9th Cir. 1982). The seizure of "mere evidence" of the

commission of a crime was authorized by the Supreme Court in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 310 (1967).

The warrant described the items to be seized with particularity and did not authorize a general search. The record does not support Hurt's allegation that the officers engaged in "generalized rummaging." The district court did not err in denying the motion to suppress.

D. ADMISSIBILITY OF SEXUALLY EXPLICIT MATERIAL FOUND IN THE RESIDENCE OF THE ACCUSED

Hurt also seeks reversal on the ground that the district court erred in admitting books, magazines, and films seized by the officers to prove knowledge of the nature of the three films described in the indictment. No objection to the admissibility of these

objects to prove knowledge was made at trial.

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record . . .

Fed. R. Evid. 103(a)(1).

Because Hurt failed to object at trial, we may not review this evidentiary ruling unless the appellant can demonstrate that the admission of the evidence was plain error affecting his substantial rights. Fed. R. Crim. P. 52(b). There is no plain error where the defendant has failed to demonstrate that the admission of the evidence affected the outcome and his right to a fair trial. United States v. Rogers, 769 F.2d 1418, 1426 (9th Cir. 1985).

The government established Hurt's knowledge that the films he ordered were

sexually explicit through the admissions of the defendant. The physical evidence objected to for the first time on this appeal was merely corroborative. Hurt has not demonstrated that substantial rights were affected by the trial court's rulings on admissibility, and therefore, we are precluded from reviewing this claim of error.

E. SUFFICIENCY OF THE EVIDENCE TO SHOW KNOWLEDGE THAT OBSCENE MATERIALS WERE ORDERED

As discussed earlier, the district court found specifically that the films were obscene, under the test of Miller v. California, and appellant has not contended on appeal that they are not obscene. Hurt does contend that reversal is compelled because "the government failed to prove that he knew the nature of the films he received in the mail." Appellant's Opening Brief, page 27.

We consider a claim that the evidence was insufficient to support a criminal conviction by viewing the record in the light most favorable to the prosecution to see if, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

Section 1461 makes it a crime if a person "knowingly uses the mails" for the delivery of obscenity. 18 U.S.C. § 1461. Thus, knowledge is an essential element of 18 U.S.C. § 1461. Each element of the corpus delicti of a crime must be proved beyond a reasonable doubt. In Hamling v. United States, 418 U.S. 87, 123 (1974), the Supreme Court held the knowledge requirement of section 1461 is satisfied if the prosecution proves that the

defendant "knew the character and nature of the materials." Id. The government does not have to prove the accused knew that the materials are legally obscene. Id. Proof of the knowledge that the material is obscene may be established by circumstantial evidence. See Smith v. California, 361 U.S. 147, 154 (1959) (eyewitness testimony is not required to establish knowledge of the contents of obscene material).

Hurt demonstrated his knowledge of the character and nature of the films he ordered from Smit when he told the officer who reminded him that they had had a previous conversation about pornography that the evidence they were looking for was on the coffee table. A rational trier of fact could readily conclude from this spontaneous utterance that Hurt knew that the unreeled film he

had received moments before from the mail carrier depicted sexually explicit conduct. The evidence that Hurt ordered the film through a coded number, instead of setting forth the name of the motion picture he wished to purchase, and that the contents of the packages he received were unreeled and deceptively labelled to avoid official detection, also indicates that he was aware of their nature and character. The presence in the residence of other sexually explicit materials and a list of addresses of the suppliers of child pornography further supports the trier of fact's conclusion that Hurt was a regular consumer of such materials and had the requisite knowledge when he ordered the films.

The evidence was sufficient to convince a trier of fact beyond a reasonable doubt that Hurt had knowledge

that the films were obscene. The district court did not err in denying Hurt's motion for a judgment of acquittal.

F. MULTIPLICITY

Hurt's final contention concerns the validity of the entry of a judgment of conviction for two violations of section 1461 and the imposition of consecutive sentences for the use of the mails for the placement and delivery of a single order of three obscene films. Although Hurt objects only to consecutive sentencing, this court addresses the underlying issue of multiplicity as well.

As discussed above in Part II of this opinion, the grand jury charged Hurt under the first part of section 1461 which compels the prosecution of "whoever knowingly uses the mails for the mailing,

carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be unmailable." Thus, the indictment focuses on a single act of using the mails to order three obscene films. Notwithstanding the fact that Hurt's conduct involved a single transaction, the grand jury charged Hurt in Count One with knowingly using the mails for the delivery of two films, and in Count Two with the delivery of the third film. Apparently, the decision to charge two counts resulted from the fact that Smit elected to send the films in two packages. Presumably, had Smit placed each films in a separate package, the (sic) Presumably, had Smit placed each film in a separate package, the grand jury would have indicted Hurt for three violations of section 1461. On the other

hand, using the same logic, had Smit placed all three films in one package, Hurt would presumably have been prosecuted for a single violation of the statute.

The rule against multiplicity prohibits the charging of a single offense in several counts and is intended to prevent multiple punishment of the same act. United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). The text of section 1461 gives no clear indication whether placement of a single order through the mails should result in punishment for multiple offenses, should the distributor respond to the request by mailing separate packages. In Bell v. United States, 349 U.S. 81 (1955), the Supreme Court held that:

> [I]f Congress does not fix the punishment for a federal

> offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . .

Id. at 84.

It is not clear that Congress intended multiple punishment under section 1461 where there is no proof that a person who uses the mails to order several items intended that several packages be mailed in response to his request. We resolve the uncertainty by holding that the sending of one order for three obscene movies is a single offense.

The government argues that Hurt was properly convicted of two counts of violating section 1461 because Smit used the mails in conduct as the distributor of obscene materials. This contention is inconsistent with the government's position that section 1461 applies to the

conduct of a person who uses the mails to order sexually explicit material.

Specifically, the government insists that "Congress showed its intent to hold each parcel to be a violation when it stated that . . . 'every obscene, lewd, lascivious, indecent, or vile article, matter, thing or substance' is a nonmailable matter." Appellee's Brief, pages 19-20 (emphasis in original). This argument confuses the definition of nonmailable matter with the elements of the crime of using the mails for the delivery of such items.

After listing several items, including obscene matter, Congress stated that each "[i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." 18 U.S.C. § 1461.

The elements of the conduct prohibited by Congress follow this declaration of the type of items that are nonmailable. Nowhere in the definition of the crimes described in section 1461 did Congress indicate that a person who sends a single order for several nonmailable items is guilty of more than one offense. Hurt did not send more than one package through the mail. The distributor, Smit, used the mails for such purpose. The government's argument appears to be addressed to an issue not before this court, i.e., can Smit be prosecuted for each package sent through the mail in response to a single order for several nonmailable items, and, if so, can Hurt be prosecuted for Smit's crime under 18 U.S.C. § 2 ("Whoever willfully causes an act to be done which if directly performed by him or another

would be an offense against the United States, is punishable as a principal"). It should be noted that the government did not obtain an indictment against Hurt for knowingly causing Smit to delivery sexually explicit films through the mails. Section 1461 provides that "[w]hoever . . . knowingly causes to be delivered by mail according to the direction thereon, or at the place it is directed to be delivered by the person to whom it is addressed . . . shall be fined . . . or imprisoned . . . ." 18 U.S.C. § 1461 (emphasis added). Hurt was not charged under this part of section 1461. Thus, we cannot determine whether he could have been charged with more than one offense for causing Smit to mail the films in separate packages.[2]

CONCLUSION

Section 1461 prohibits the use of

the mails to order the delivery of obscene materials for personal use in the privacy of the home. Because section 1461 proscribes the shipment of obscenity, not its possession, the statute does not violate the first amendment.

The rule against multiplicity compels us to resolve our uncertainty in favor of the defendant regarding the responsibility of the recipient for the act of the distributor in sending more than one parcel through the mails in filing a single order for several items. Therefore, we conclude that a person sending a single order for obscene material through the mail should not be punished based on the number of packages he receives from the distributor.

We affirm the judgment of conviction regarding Count One. We reverse the

judgment imposed as to Count Two as a violation of the rule against multiple sentences for a single offense. AFFIRMED IN PART, REVERSED IN PART.

FOOTNOTES

1 Section 1461 provides as follows:

> Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance; and --
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means, any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing

may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing --

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any office of by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation of disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder or assassination.

2 The government's reliance on United States v. Crockett, 534 F.2d 589 (5th Cir. 1976) and Hanranan v. United States, 348 F.2d 363 (D.C. Cir. 1965) in support of its proposition that Hurt can be held liable for two separate crimes under section 1461 because he received two packages is misplaced. Each of these cases involves the prosecution of a person who sent fraudulent communications through the mails in violation of the mail fraud statute."

*FOR PUBLICATION

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LASCO LAVAUN HURT, Defendant-Appellant.	)	No. 85-3058
	)	D.C. No. CR 84-95-01 BU
	)	O R D E R

Appeal from the United States District Court for the District Court James M. Burns, District Judge, Presiding

Argued and submitted March 4, 1986 Portland, Oregon

Before: FLETCHER, ALARCON, and WIGGINS, Circuit Judges.

The court's opinion in this case filed July 25, 1986, and which appears in 795 F.2d at 765 is amended as follows:

1. Add the following on page 773, prior to the paragraph beginning with headnote [11]:

Hurt asserts that we must reverse this matter because the description of the items to be seized was "very similar" to the warrant found invalid in our decision in United States v. Hale, 784 F.2d 1465 (9th Cir. 1986). We disagree. Hale is clearly distinguishable. In Hale, we conclude that a warrant describing the items to be seized as "obscene, lewd, lascivious, or indecent" is "too general to support the seizure of material that was, at the time of the seizure, arguably protected by the first amendment." Id. at 1469.

The warrant in the matter before us particularly described the material to be

seized. The officers were specifically commanded to search for material "depicting minors (that is, persons under the age of 16) engaged in sexually explicit activity" as required by the fourth amendment. This language sufficiently circumscribed the officers' discretion at the time of the seizure. See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325-26, 99 S.Ct. 2319, 2324, 602 L.Ed.2d 920 (1979). The words used in the warrant to describe the material sought need no expert training or experience to clarify and limit their meaning. Any rational adult person can recognize sexually

explicit conduct engaged in by children under the age of 16 when he sees it. Furthermore, the facts show that when asked where he kept his pornography, Hurt directed the officers to the closet in his bedroom.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

"IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR84-95BU
	)	
v.	)	
	)	FINDINGS AND
LASCO LAVAUNN HURT, aka Don Hunt, Don Hall,	)	OPINION
	)	
	)	
Defendant.	)	

Defendant is before me on a two-count indictment charging him with violations of 18 U.S.C. §§ 1461 and 1462, the mailing and importation of obscene matter. Pursuant to Fed. R. Crim. Pro. 23(c), jury trial was waived; the case was heard on stipulated facts.

Defendant challenged the validity of the search warrant and moved to suppress both the evidence seized and the statements made at the time of the

search. The motions were consolidated with the trial.

FACTS

Defendant's home was searched after a controlled mail delivery of pornographic films from Amsterdam. The warrant was issued on a finding of probable cause by a U.S. Magistrate. After delivery of the packages, agents approached the defendant's home, identified themselves, and read defendant his rights.

Defendant then pointed to the films on the table and told the officers that there was "what they were looking for." He also made statements pertaining to the location of the rest of his library which was also seized. Defendant was not arrested and was given a receipt for all property seized.

DISCUSSION

Suppress Motions

Defendant moves to suppress the films on the grounds that they were seized under an invalid general warrant. He also moves to suppress statements made to the officers during the search. These motions are not well taken; therefore thus I deny them.

The warrant involved here explicitly described the items to be seized, and the search was limited by the terms of its authorization. See, Walter v. United States, 447 U.S. 653, 656-657 (1980) (discussion of the Fourth Amendment particularity requirement). It left no discretion for the searching officers. U.S. v. Gomez-Soto, 723 F.2d 649, 653 (9th Cir. 1984), cert. denied, _____ U.S. _____, 104 S.Ct. 2360 (1984); U.S. Drebin, 557 F.2d 1316, 1322 (9th Cir.

1977), cert. denied, 436 U.S. 904 (1978).

Defendant's statements were voluntarily and intelligently made - they were not the product of a custodial interrogation or other adverse conditions created by the federal agents. Miranda v. Arizona, 384 U.S. 436 (1966).

Merits

I find beyond a reasonable doubt the following:

1. That defendant purchased postal money orders, and with them, ordered the materials from Sweden.

2. That parcels marked "tablecloth", "nameplate" and "Kalendar" (mailings 1,2, and 3), were sent to defendant from Amsterdam in December 1983.

3. That these parcels in fact contained unreeled 8 mm films entitled

"First Suck", "Young Girl", and "Lover Boy, Billy and Mike".

4. That these parcels came to the attention of U.S. Customs & Postal Agents in Oakland, California, and were sent on to Portland, Oregon.

5. That a valid search warrant was issued by U.S. Magistrate Hogan contingent upon delivery of the first two mailings.

6. That delivery of those mailings were made on December 21, 1983 by a regular postal carrier at approximately 1:30 p.m.

7. At approximately 2:00 p.m., federal agents and local law enforcement officials executed the search warrant at defendant's residence at 722 Willow, Street, Myrtle Point, OR.

8. That defendant was advised of his Miranda rights and knowingly and voluntarily made statements to the

searching officers.

Based on the stipulation and evidence presented, I find that defendant did knowingly cause the importation and delivery of obscene materials in violation of §§ 1461 and 1462.

The evidence, including the materials named in the warrant, plus others were seized in the home, particularly Government Exhibits 7, 8, 9, and 10, irresistibly compels the conclusion and finding that defendant knew full well of the pornographic character of that which he ordered from Amsterdam.

I have viewed each of the films seized and find that they meet the standards for obscenity set forth in Miller v. California, 413 U.S. 15 (1972); that is to say that taken as a whole, the works appeal to the purient interest in

sex, are patently offensive under prevailing community standards, and have no literary, artistic, political or scientific value. See also Hamling v. U.S., 418 U.S. 87 (1974), reh'g denied, 419 U.S. 885 (1974); U.S. v. Danley, 523 F.2d 369 (9th Cir. 1975), cert. denied, 424 U.s. 929 (1976).

Accordingly, I find defendant guilty beyond a reasonable doubt. I order a pre-sentence investigation. Defendant is directed to meet with the Probation officer for such purpose. Sentencing is set for March 4, 1985 at 11:00 a.m.

IT IS SO ORDERED.

DATED this 24 day of January, 1985.

/s/ James M. Burns
United States District Judge"

JUDGMENT AND PROBATION/COMMITMENT ORDER

In pertinent part:

". . . The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, 18 U.S.C. 4205(a) and fined the sum of $5,000.00 on Count 1.

IT IS ADJUDGED on count 2, the defendant is committed to the custody of the Attorney General for a period of five (5) years and fined the sum of $5,000.00. The execution of the sentence as to imprisonment only is suspended and the defendant placed on probation for a period of five (5) years, to commence upon defendant's release from physical custody on count 1, upon the conditions of probation as contained in Probation Form No. 7.

* * *

/s/ James M. Burns
JAMES M. BURNS Date 4-16-85"

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

AMENDMENT IV

Security from unreasonable searches and seizures. the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

AMENDMENT IX

Rights retained by people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

[Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OREGON

ARTICLE I
BILL OF RIGHTS

Section 8. Freedom of speech and press. No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

TITLE 18 U.S.C. SECTION 2

§ 2. **Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717).

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

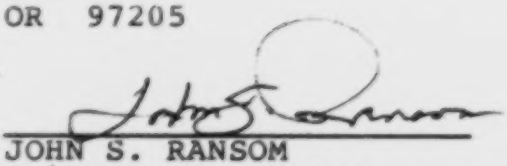
CERTIFICATE OF SERVICE BY MAIL

I, John S. Ransom, Counsel of Record and a Member of the Bar of this Court, certify that pursuant to Rule 28.4, service has been made of the within Petition for Writ of Certiorari on the counsel for the Respondent by depositing in the United States Post Office at Portland, Oregon on March 23, 1987, a certified true, exact and full copy thereof addressed to:

The Honorable Charles Fried
Solicitor General
Dept. of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

With additional copy to:

Charles Turner
U.S. Attorney
312 U.S. Courthouse
620 S.W. Main
Portland, OR 97205



JOHN S. RANSOM
Counsel for Petitioner-Appellant

I hereby certify that I served the foregoing .....

..... on .....,

attorney for ..... on the ..... day of

....., 19 ....., by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed

in a sealed envelope addressed to the said attorney at .....

.....

which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at

....., Oregon, on the day last above mentioned, with the postage thereon fully paid.

.....

Attorney ..... for

Service of the within .....

is hereby accepted in ....., Oregon, this

..... day of ....., 19 .....,

by receiving three copies thereof.

.....

Attorney ..... for .....